No. 15307

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA, APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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JURISDICTION

This is an appeal by the National Labor Relations Board from an order, issued July 16, 1956, by the United States District Court for the Southern District of California, Central Division. That order refused to enforce certain subpenas *duces tecum* and *ad testificandum* issued by the Board pursuant to Section 11 (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), and di-

rected to the above-named appellees. The jurisdiction of the Court below was based on Section 11 (2) of the Act.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

On April 30, 1956, the General Counsel acting on behalf of the Board and pursuant to his powers under the Act, issued through the Regional Director at Los Angeles a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the Company had engaged and was engaging in unfair labor practices, in violation of Section 8 (a) (1), (2), and (3) of the Act, and that the association had engaged and was engaging in unfair labor practices, in violation of Section 8 (b) (1) (A) and (2) of the Act. The consolidated complaint was issued and served upon the parties together with an order of consolidation and a notice that a hearing would be conducted, before a duly designated Trial Examiner of the Board, on the allegations set forth in the complaint (R. 19–26).

On June 1, 4, and 5, 1956, at the written request of counsel for the General Counsel, and in accordance with Section 11 (1) of the Act and Section 102.31 (a) of the Board's Rules and Regulations (29 C. F. R. 102.31 (a)), the Regional Director at Los Angeles issued certain subpenas *ad testificandum* and *duces tecum* directed to appellees, under the seal of the National Labor Relations Board and under the fac-

[1] The pertinent statutes and regulations are appended hereto (pp. 26 *et seq.*, *infra*).

simile signature of Abe Murdock, a member of the Board (R. 30–43).

On June 11, 1956, appellees filed Petitions to Revoke Subpenas with the Regional Director, asserting that (1) the Board could not delegate its power to issue subpenas to the Regional Director, and (2) counsel for the General Counsel is not a party to the unfair labor practice proceeding, entitled to the issuance of subpenas. As to the subpenas *duces tecum,* appellees Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced (R. 44–51).

On June 11, 1956, the Regional Director, in accordance with Section 102.31 (b) of the Board's Rules and Regulations, referred the Petitions to Revoke Subpenas to the Trial Examiner who, after consideration of the petitions, supporting memoranda, and oral argument, denied the petitions. Appellees nevertheless refused to obey the subpenas. The Trial Examiner thereupon, at the request of counsel for the General Counsel, continued the unfair labor practice hearing pending applications to have the subpenas enforced by the court below (R. 51–80).

The Board, by its General Counsel, on June 29, 1956, filed with the court below an application for an order requiring appellees to obey the subpenas involved herein (R. 3–9).

Appellees resisted enforcement of the subpenas on the grounds that (1) the Regional Director did not have authority to issue the subpenas, (2) the Trial Examiner did not have authority to rule upon ap-

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[1] The pertinent statutes and regulations are appended hereto (pp. 26 *et seq.*, *infra*).

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Appellees resisted enforcement of the subpenas on the grounds that (1) the Regional Director did not have authority to issue the subpenas, (2) the Trial Examiner did not have authority to rule upon ap-

pellees' Petitions to Revoke Subpenas, and (3) counsel for the General Counsel was not entitled to the issuance of subpenas upon his application. Appellees Lewis and Schmidt did not renew their objections to the relevancy of the documents and records required to be produced by the subpenas addressed to them.

The court below, on July 30, 1956, issued its order quashing the subpenas on the authority of *N. L. R. B.* v. *Pesante,* 119 F. Supp. 444 (S. D. Calif.) (R. 83–84). The *Pesante* case, so far as here relevant, held (1) that subpenas issued under facsimile signature of a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpenas; and (3) that the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpenas.

SPECIFICATION OF ERRORS BELOW

1. In holding that only the Board itself has the power to revoke subpenas and that consequently the Trial Examiner was without authority to rule on appellees' petitions to revoke the subpenas here in question.

2. In holding that the subpenas were invalid because they were issued upon the request of counsel for the General Counsel, who is not a "party to the proceeding" within the meaning of the Board's Rules and Regulations, and therefore not entitled to request the issuance of subpenas.

3. In quashing the subpenas and refusing to grant the Board's request for their enforcement.

ARGUMENT

Preliminary statement

The Board urged before the District Court that it could delegate to subordinates its power of issuance and revocation of subpenas. It also urged, as to the issuance of subpenas, that that function, compulsory in nature and entailing no act of discretion under Section 11 (1) of the Act, represents no more than a ministerial act which, under settled law, is delegable without express statutory authorization. The District Court, on the authority of *N. L. R. B.* v. *Pesante,* 119 F. Supp. 444 (S. D. Calif.), held that the Board could not delegate its powers to revoke subpenas. With respect to the question of the Board's authority to delegate responsibility for the issuance of subpenas, the court below did not reach this question because of its acceptance of the ruling of the Court in *Pesante* that issuance of subpenas by a Regional Director under facsimile signature of a Board member constitutes issuance by the Board member himself. However, all other courts considering this question have held the procedure here utilized for issuing subpenas to be valid, not on the narrow ground relied on by the Court in *Pesante,* but rather on the grounds unsuccessfully urged on the court below. *N. L. R. B.* v. *John S. Barnes, Corp.,* 178 F. 2d 156 (C. A. 7); *N. L. R. B.* v. *Gunaca,* 230 F. 2d 542 (C. A. 7), affirming 135 F. Supp. 790 (D. C., E. Wis.), certiorari

granted, 351 U. S. 981;[2] *Edwards* v. *N. L. R. B.,* 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870. In these circumstances, extended discussion does not seem to be warranted and we respectfully refer the Court to the cited cases, particularly to the *Barnes* case, where the Seventh Circuit, after carefully reviewing the Act as a whole, its purpose and policy, and its legislative history, concluded that the Board was acting fully within its powers in utilizing its Regional Directors to perform the ministerial function of issuing subpenas.

The principal issues to be treated herein, accordingly, are (1) whether a Trial Examiner of the Board has authority to rule upon petitions to revoke subpenas, and (2) whether the General Counsel is a party to an unfair labor practice proceeding entitled to the issuance of subpenas upon his request.

I. The trial examiner had authority to rule upon appellees' petitions to revoke subpenas

A. Introduction

As stated, the court below relied on the decision of Judge Hall in *N. L. R. B.* v. *Pesante,* 119 F. Supp. 444 (S. D. Calif.) in quashing the subpenas here involved. Judge Hall construed Section 11 (1) of the Act as requiring the Board itself to pass upon petitions to revoke subpenas and consequently as prohibiting any delegation of this function to Trial Ex-

[2] None of the issues presented in this case are before the Supreme Court in the *Gunaca* case, petitioner having abandoned such arguments in his brief on the merits filed in the Supreme Court (No. 77, October Term, 1956).

aminers, ~~in unfair labor practice proceedings.~~ Section 11 (1), in relevant part, provides that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas" and that upon the filing of a petition to revoke "the Board shall revoke such subpena" if in its opinion the evidence sought is not relevant or is not described with sufficient particularity. The Court in *Pesante* concluded that the excision of the words "or its duly authorized agent or agents" which had been included in the House Bill demonstrated the intent of Congress to limit to the Board or its members, the power to issue subpenas, and to limit to the Board itself the power to rule on petitions to revoke subpenas. We believe that the court below was in error in relying on *Pesante.* Not only is the court's conclusion based upon what we believe is a too literal reading of Section 11 (1) of the Act (*infra,* pp. 15–20), but it wholly fails to take cognizance of Section 7 (b) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001 et seq.) which confers upon agency hearing officers subpena powers coextensive with those of the agency. We turn now to this latter point.

B. The Administrative Procedure Act vests trial examiners with subpena powers coextensive with those of the agency

Section 7 (b) of the Administrative Procedure Act, referred to above, provides:

> * * * Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue sub-

> penas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

Thus, under Section 7 (b) hearing officers, "subject to the public rules of the agency and within its powers"[3] are empowered to "issue subpenas authorized by law", to "rule upon offers of proof and receive relevant evidence", and to "dispose of procedural requests or similar matters." Every other court having an opportunity to consider Section 7 (b) in conjunction with Section 11 (1) of the National Labor Relations Act has reached a conclusion contrary to that of the court below, namely, that Trial Examiners of the National Labor Relations Board have authority to rule on petitions to revoke subpenas.

The Court in *Pesante* had no occasion to consider the effect of the Administrative Procedure Act be-

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[3] Pursuant to Section 6 of the National Labor Relations Act authorizing the Board to make "such rules and regulations as may be necessary" the Board in Section 102.35 of its Rules and Regulations provided that "the trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers; * * * (b) to grant applications for subpenas; (c) to rule upon petitions to revoke subpenas.

cause the subpena involved in that case was issued in the course of a representation proceeding under Section 9 of the National Labor Relations Act and was returnable before a "non-judicial" hearing officer.[4] Section 9 of the National Labor Relations Act authorizes the conduct of representation hearings, which are investigatory in nature, by Board employees who do not meet the hearing officer requirements of the Administrative Procedure Act. However, in the instant case the subpenas were issued in an unfair labor practice proceeding under Section 10 of the National Labor Relations Act and were returnable before a Trial Examiner who was duly qualified under the Administrative Procedure Act. The court below, in relying upon *Pesante,* therefore lost sight of the critical question, which is not the general one of the Board's power to delegate its subpena power to subordinates, but the specific one of the possession of such power by Trial Examiners by virtue of the Administrative Procedure Act.

This distinction must be kept in mind, for in respect to delegation of subpena power to subordinates generally (as distinguished from Trial Examiners), one looks only to the basic agency statute and from it seeks to determine whether, under that statute, delegation of the subpena power, when not expressly authorized, is fairly to be implied. That was the

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[4] Section 7 of the Administrative Procedure Act, whose applicability respecting adjudications is limited to "hearings which section * * * 5 requires to be conducted pursuant to this section," is inapplicable to adjudications involving "the certification of employee representatives" (Section 5 (6)).

problem before the Supreme Court in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, upon which the court in *Pesante* relied, and in *Fleming* v. *Mohawk,* 331 U. S. 111, which it sought to distinguish, but is not the primary problem here involved. We are not concerned with *implied* powers of delegability under the National Labor Relations Act but rather are concerned with an *express* conferment of subpena powers upon Trial Examiners, as hearing officers, under Section 7 (b) of the Administrative Procedure Act.

The question of the authority of Trial Examiners of the National Labor Relations Board to pass upon petitions to revoke subpenas was first presented in *N. L. R. B.* v. *International Typographical Union,* 76 F. Supp. 895 (S. D. N. Y.). Judge Medina, upon a full consideration of the interrelation of the Administrative Procedure Act and the National Labor Relations Act, concluded that Board Trial Examiners have power to act upon petitions to revoke subpenas. In the opinion Judge Medina discusses Section 7 (b) of the Administrative Procedure Act at length and also considers the effect of Section 12 thereof providing that "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." His conclusion merits quotation here:

> There is no contention, nor could there well be, that Section 11 of the National Labor Relations Act as amended in 1947, or that any other provision of the Labor Management Relations Act of 1947 expressly takes from trial examiners the right to issue subpenas and rule

upon motions to quash, which are in terms or by necessary implication among the powers of trial examiners, as enumerated in Section 7 (b) of the Administrative Procedure Act.

Thus, as the two statutes are to be read together, it seems reasonably clear that the National Labor Relations Board was authorized to formulate rules pursuant to the terms of which trial examiners might issue subpenas and "dispose of procedural requests or similar matters," such as the determination of whether or not, to use the traditional term, subpenas should be quashed (76 F. Supp. at 897).

In *N. L. R. B. on relation of Kohler Co.* v. *Gunaca,* 135 F. Supp. 790, Judge Grubb of the United States District Court for the Eastern Division of Wisconsin, was faced with the identical argument which was made in *Pesante*—that the legislative history of the 1947 amendments to the Act showed an intention on the part of Congress to limit the authority to rule on motions to revoke subpenas to the Board itself. Judge Grubb, stressing Section 7 (b) of the Administrative Procedure Act, fully upheld the power of Trial Examiners to rule on petitions to revoke. The order enforcing the subpena in question was appealed to the Seventh Circuit. That Court affirmed, *N. L. R. B. on relation of Kohler Co.* v. *Gunaca,* 230 F. 2d 542, and adopted Judge Grubb's opinion as its own. The Seventh Circuit's action was foreshadowed by its earlier opinion in *N. L. R. B.* v. *Barnes,* 178 F. 2d 156, in which in connection with a related problem, the Court clearly indicated its disagreement with the

interpretation of Section 11 (1) of the Act adopted by the Court in *Pesante* (see pp. 18–20, *infra*).

It may be noted that commentators in this field emphasize that Section 7 (b) authorizes agency hearing officers to exercise whatever subpena powers are possessed by the agency and sanctions the delegation of the agencies' subpena powers to hearing officers even in instances in which heretofore the Courts have refused to permit such delegation by implication.[5] Indeed, it has been observed that by virtue of the Administrative Procedure Act the powers exist in the hearing officer independently of delegation and that the agency could not properly withhold such powers from a hearing officer, even if it would. The Attorney General's Manual on the Administrative Procedure Act states (p. 74):

> In other words, not only are the enumerated powers thus given to hearing officers by section 7 (b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, "shall have authority," but from the general statutory "purpose" of enhancing the status and role of hearing officers. Thus, in the Senate Comparative Print of June 1945, p. 14 (Sen. Doc. p. 29), it is stated that "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney

[5] See Attorney General's Manual on the Administrative Procedure Act, U. S. Department of Justice, 1947, p. 74; Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Illinois Law Review 368, 391–392.

> General's Committee stressed as essential (Final Report, pp. 43–53, particularly at pp. 45–46 and 50)." See also, Sen. Doc. pp. 207, 269, 319–320); cf. Sen. Rep. p. 42 (Sen. Doc. p. 228).

Cf. *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474, 495.

The conclusion that Section 7 (b) of the Administrative Procedure Act empowers Trial Examiners of the Board to exercise all subpena powers vested in the Board is not only in harmony with the basic objectives of the Administrative Procedure Act but also is consistent with the effectuation of the policies of the National Labor Relations Act. As Judge Medina said in the *I. T. U.* case, after discussing the legislative history of the 1947 Amendments and referring to the absence of valid reason to deprive Trial Examiners of the power to pass upon questions affecting subpenas:

> Many reasons at once suggest themselves to support the contention that such powers exist; and not the least of these is that, in the absence of such powers, a litigant by the simple expedient of a motion to revoke a subpena might unreasonably delay proceedings until the motion could be disposed of at Washington by the Board or three members thereof convened for the purpose. An accumulation of such motions to revoke subpenas, whether the result of mere chance or of a concerted effort to sabotage the functioning of the National Labor Relations Board under the terms of the Labor Management Relations Act of 1947, would perhaps bring the entire machinery of the National Labor Relations Board to a standstill (76 F. Supp., at 897).

In the *Gunaca* case, *supra,* Judge Grubb, after noting the conflicting holdings in the *Pesante* case, on the one hand, and in the *International Typographical Union* and the *Barnes* cases, on the other, found the reasoning of the latter two Courts more persuasive. As he observed, in part (135 F. Supp., at 794):

> It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions.

For the reasons previously alluded to, neither *Fleming* v. *Mohawk,* 331 U. S. 111 (1947), which affirmed the Administrator's authority under the Emergency Price Control Act to delegate his subpena power to subordinates, nor *Cudahy Packing Co.* v. *Holland,* 315, U. S. 357 (1941), which denied the Administrator's authority under The Fair Labor Standards Act to delegate his subpena power to subordinates, is presently relevant. Each arose prior to the effective date of the Administrative Procedure Act, and *Cudahy* dealt with a state of facts which would not, apart from time, have fallen within its scope. It pertained to an investigation not looking toward an adjudication upon a record and, hence, would not even now be subject to the hearing requirements of Section

7 of the Administrative Procedure Act. The *Cudahy* and *Mohawk* cases were concerned with the factors to be weighed in determining the propriety of implying an authority to delegate subpena power when not expressly granted. The Administrative Procedure Act authoritatively settles that question in favor of delegation in those situations which it governs. It surrounds the delegation with safeguards that prevent its abuse, and obviates thereby the concern underlying the *Cudahy* case that the subpena power is "capable of oppressive use, especially when it may be indiscriminately delegated and the subpena is not returnable before a judicial officer" (315 U. S., at 363). For, under the Administrative Procedure Act, delegation of the subpena power is limited to the hearing officer who is an informed and responsible quasi-judicial official of assured and independent status.

In view of the foregoing, it is submitted that the court below erred in failing to give effect to the express conferment of subpena powers upon Trial Examiners contained in Section 7 (b) of the Administrative Procedure Act.

C. Aside from the Administrative Procedure Act, the Board has authority to delegate subpena revocation powers to trial examiners

As noted above, Section 11 (1) of the National Labor Relations Act, with reference to the revocation of subpenas, states "the Board shall revoke" under certain specified conditions. The Court in *Pesante,* upon which the court below relied, construed this portion of Section 11 (1) as requiring the Board itself to rule on all petitions to revoke subpenas and as pro-

hibiting any delegation of subpena functions to Trial Examiners.[6] We believe that the conclusion of the Court in *Pesante* attributes to Congress a degree of precision in draftmanship which is unwarranted. In various Sections of the Act Congress used terminology which, if construed with absolute literalness, would appear to rule out the use of subordinates in carrying out many of the Board's functions. However, it has never been seriously suggested that the use of such language precluded the Board from delegating some of these functions to subordinates.

For example, Section 9 (c) (1) states with reference to the investigation of representation petitions that "the Board shall investigate such petition." In Section 10 (k) "the Board is empowered and directed to hear and determine" jurisdictional disputes giving rise to allegations of Section 8 (b) (4) (D) violations. Certainly it cannot be validly contended that the use of the language above quoted indicates an intention to prevent the Board from exercising these functions through subordinates. Cf. *N. L. R. B.* v. *Barnes,* 178 F. 2d 156, 159 (C. A. 7). Similarly, in providing in Section 10 (j) that "the Board shall have power" to petition for appropriate temporary relief or restraining order, Congress did not intend to prohibit the Board from authorizing the General Counsel to decide when to institute such a proceeding (*Evans* v. *I. T. U.,* 76 F. Supp. 881, 886–889 (S. D. Ind.)). Consequently, since other provisions of the

[6] As stated in n. 3, p. 8, *supra*, the Board in its Rules and Regulations has formally delegated to its Trial Examiners authority "to rule upon petitions to revoke subpenas."

Act in terms confer only on the Board the exercise of delegable functions, it does not necessarily follow from the fact that Section 11 (1) provides, with respect to subpenas, that "the Board shall revoke", that Congress intended this function to be exercised by the Board alone.

As indicated, the Court in *Pesante* relied heavily on the circumstance that the section as enacted merely provides that "the Board shall revoke" (119 F. Supp. at 450–451), yet when the amendments to the Act were being considered, Section 11 of the House Bill had specifically provided that the power of revocation could be exercised either by the Board "or its duly authorized agent or agents." However, this occurrence loses decisive significance in light of the fact that the Conference Report (Report No. 510, 80th Cong., 1st Sess.), p. 58, expressly states that "the conference agreement follows the provisions of existing law" except for making the subpena procedure a two-step operation instead of one, i. e., making issuance of the subpena automatic but subject to a subsequent petition to revoke (1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 562; 2 Leg. Hist. 1543). Aside from the circumstances noted above, there is nothing in the committee reports or the debates prior to the enactment of the 1947 amendments which suggests any intention on the part of Congress to deprive Trial Examiners of the power to pass upon subpena matters. See the *I. T. U.* case, 76 F. Supp., at 897.

Under the original Act, as the Seventh Circuit noted in the *Barnes* case (178 F. 2d. at 161), Congress was

well aware that the Board, notwithstanding that the terms of Section 11 (1) referred only to the Board members, had consistently interpreted Section 11 (1) as sanctioning the delegation to Trial Examiners and Regional Directors of the power to issue subpenas, which, because of the provisions of the Wagner Act, entailed the discretion now exercised at the stage of a motion to revoke.[7] Yet nowhere in the legislative history of the Amendments is there any suggestion of Congressional disapproval of this construction of the Act. "Under the circumstances", as this Court observed in connection with another point in *N. L. R. B.* v. *Ray Brooks,* 204 F. 2d 899, 905 (C. A. 9), affirmed 348 U. S. 96, "it is a fair assumption that by its silence on the question Congress accepted this administrative and judicial construction of the Act."

The *Barnes* case, *supra,* fully supports the Board's construction of Section 11 (1). In this case (178 F. 2d 156), the Seventh Circuit had before it the question of the Board's power to delegate its subpena issuance powers in representation proceedings. The reasoning by which the Court upheld the delegability of such powers is fully applicable here. The Court, in rejecting the very arguments made by appellees in the court below based on the *Cudahy* decision of the Supreme Court (*supra,* pp. 9–10, 14–15), pointed out that the validity of the Board's delegation must be determined,

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[7] Thus Section 11 (1) of the Wagner Act (49 Stat. 449) provided that "Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation."

not from "consideration of the language contained in Section 11 (1)" alone, but in the light of "the Act as a whole, its purpose, what Congress expected the National Labor Relations Board to accomplish under the Act, and its legislative history" (178 F. 2d, at 159). After citing Section 5 empowering the Board to "prosecute any inquiry necessary to its functions" through "such agents or agencies as it may designate" and noting that "the issuance of subpenas is a necessary incident to the power to investigate and prosecute," the Court concluded that "this expressed power to delegate the authority to prosecute" furnishes "reason to believe that Congress intended that the Board should also be authorized to delegate its subpena power." The opinion also refers to Section 6 granting to the Board broad power to make rules and regulations "necessary to carry out the provisions of the Act," and goes on to say, quoting from *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 121, that " 'Such a rule-making power may itself be an adequate source of the authority to delegate a particular function ' * * * (*Ibid*). Finally the Court commented with respect to a similarly "restrictive construction" of Section 11 (1), as follows (178 F. 2d, at 160):

> If we were to hold that the Board, or one of its members, must personally do every act essential to the execution and issuance of each subpena in every proceeding being conducted under this Act throughout the United States and its Territories, and that the Board must then, as a Board, pass upon every *petition for the revocation* of any subpena, it would be

> physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act. [Emphasis added.]

In *Edwards* v. *N. L. R. B.*, 189 F. 2d 970, certiorari denied, 342 U. S. 870, and *Jackson Packing Co.* v. *N. L. R. B.*, 204 F. 2d 842, 843–844, the Fifth Circuit also rejected the analogous contention that the Board lacked authority to delegate the power to issue subpenas. *Edwards* expressly relies upon the *Barnes* case, the reasoning of which, as we have shown, negates appellees' contention that the Board may not delegate its power to rule on petitions to revoke subpenas after their issuance.

Thus both reason and authority support the construction of Section 11 (1) contended for herein. In these circumstances, and particularly in view of the stated intention of the Conferees to change the subpena procedure only with respect to making it a two-step procedure instead of the former one-step procedure, we do not believe it reasonable to construe Section 11 (1) as prohibiting the Board from delegating its subpena powers to subordinates.

II. The subpenas were properly issued at the request of the General Counsel

The subpenas in this case were issued at the request of "E. Don Wilson, Counsel for General Counsel." Appellees contended below that the subpenas are void because not issued, as required by Section 11 (1) of the Act, "upon application of any party" to the unfair labor practice proceeding. In support of their contention, appellees argued that the General Counsel

is not a "party" under the Act, and even if he were a proper party under the Act, he could not delegate his authority to apply for subpenas to a subordinate employee. The court below, relying on the decision of Judge Hall in the *Pesante* case,[8] upheld appellees' contention in this regard.

At the outset it should be noted that *Pesante* involved subpenas issued in connection with a representation proceeding under Section 9 of the Act, while the instant case involves subpenas requested in the course of an unfair labor practice proceeding under Section 10 of the Act. By virtue of Section 3 (d) of the Act the General Counsel has responsibilities in connection with such proceedings of an entirely different nature from his general supervisory duties in connection with employees handling representation proceedings. Whereas Section 9 of the Act confers responsibility for the conduct of representation proceedings upon the Board itself, Section 3 (d) vests in the General Counsel "final authority, on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board." By statute, therefore, the General Counsel is the *prosecutor* of unfair labor practice complaints and as such is obviously a principal party to the proceeding. The reasoning of the *Pesante* case, which

[8] The holding in *Pesante* that a Board Regional Director is not a "party" in a representation proceeding, entitled to request subpenas under Section 11 (1), was followed in *N. L. R. B.* v. *Duval Jewelry Company of Miami*, March 30, 1956 (S. D. Fla.), 141 F. Supp. 860. The Board's appeal from the Court's decision in *Duval* is pending before the Fifth Circuit.

involved subpenas issued in an entirely different context, is thus inapplicable here.

The holding of the court below, that the General Counsel is not a party entitled to the issuance of subpenas in unfair labor practice proceedings, in effect precludes Board agents from using subpenas in such proceedings for any purpose, either investigative or for the purpose of compelling the attendance of witnesses.[9] Such holding, we believe, is manifestly contrary to the plan of the Act as a whole. Congress contemplated that the Board would carry out its functions through subordinates and expressly authorized the employment of "such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties" (Section 4 (a)). As above noted, Section 5 empowers the Board, "by such agents or agencies as it may designate," to "prosecute any inquiry necessary to its functions in any part of the United States." Section 11 of the Act, dealing with the "investigatory powers" of the Board, opens with the express statement that the foregoing powers, including the subpena power, shall be for "the purposes of all hearings and investigations, which in the opinion

[9] This conclusion necessarily follows from the holding of the Court below that the General Counsel is not entitled to a subpena requiring the attendance of witnesses and the production of documents at the hearing in the instant unfair labor practice case and its reliance upon the reasoning of the court in *Pesante*, which involved a request by the Regional Director for the issuance of a subpena in a representation proceeding. If neither the General Counsel nor the Board's Regional Directors have authority to request the issuance of subpenas, then it follows that only the Board itself may utilize subpenas.

of the Board are necessary and proper for the exercise of the powers vested in it by section 9 and section 10." Since, as we have shown, Congress intended that Board agents, rather than the Board members themselves, would conduct various investigations and preliminary hearings required under Sections 9 and 10 of the Act, the conclusion of the court below that Board agents could not utilize subpenas in the course of such hearings and investigations is manifestly inconsistent with the basic scheme of the Act. Indeed to hold, as the court below in effect has done, that persons being proceeded against by the Government for engaging in unfair labor practices are entitled to compulsory process to secure the attendance of witnesses while the Government agents prosecuting the case are not, is incongruous, to say the least.

The Administrative Procedure Act confirms that Congress intended the General Counsel to utilize subpenas in the performance of his statutory duties. Section 6 (c) of the Administrative Procedure Act provides "Agency subpenas authorized by law shall be issued to any party upon request." Section 2 (b) defines "party" as including "any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding." Moreover, the legislative history of these provisions reveals the Congressional purpose of "making administrative subpenas equally available to private parties and agency representatives" (Attorney General's Manual on the Administrative Procedure Act (1947), pp. 67–68); see also

Sen. Rep. No. 752, 79th Cong., 1st Sess., p. 20; H. Rep. No. 1980, 79th Cong., 2d Sess., p. 33.[10]

Finally, insofar as the court below adopted the reasoning of the Court in *Pesante* that the Act does not contemplate "that the General Counsel or any of the attorneys under his supervision * * * could become a 'party', or a partisan in any respect" (119 F. Supp. at 457), we believe that the Court has misconceived the nature of the procedure established in the Act to remedy unfair labor practices. An unfair labor practice proceeding is not, as the court below apparently assumes, like a private lawsuit, where the responsibility for its conduct devolves upon the private party who may have initiated it; rather such responsibility falls upon the Board and its agents, acting in the public interest. As the Supreme Court has said, "Congress has entrusted to the Board exclusively the prosecution of the proceeding. * * * The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265.[11] To perform its functions in the public interest the Board and its agents require the subpena power no less than do the private parties to

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[10] See also the following provision of Section 12 of the APA: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons."

[11] See also *Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. 2d 485, 488 (C. A. 7).

the proceeding. Accordingly, the use of subpenas by Board agents to obtain data and testimony at Board hearings has consistently been sustained by the courts.[12]

Appellees' further argument, that the General Counsel, even if a party, must personally apply for a subpena, warrants little comment. No citation of authority is necessary to establish the proposition that a party may act through counsel. Appellees filed the applications to revoke subpenas in this case through counsel. Similarly, the General Counsel requested subpenas through his counsel. Cf. *N. L. R. B.* v. *Kingston Trap Rock Co.*, 222 F. 2d 299 (C. A. 3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the District Court, denying the Board's application for enforcement of the subpenas issued against appellees, should be reversed.

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NOVEMBER 1956.

[12] See *Edwards* v. *N. L. R. B.*, 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870; *Jackson Packing Co.* v. *N. L. R. B.*, 204 F. 2d 842 (C. A. 5); *Winn & Lovett Grocery Co.* v. *N. L. R. B.*, 213 F. 2d 785 (C. A. 5); *N. L. R. B.* v. *Barnes Corp.*, 178 F. 2d 156 (C. A. 7).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

* * * * *

NATIONAL LABOR RELATIONS BOARD

SEC. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) * * * The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or

agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than

his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as to the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Secs. 1001, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. As used in this Act—

* * * * *

(c) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for agency hearing, except to the extent that there is involved * * * (6) the certification of employee representatives—

* * * * *

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the

parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. * * *

The relevant provisions of the Board's Rules and Regulations, Series 6, as amended (29 C. F. R., Part 102), are as follows:

SEC. 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the regional director and by the trial examiner on motions, by the

trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

* * * * *

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte.* The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(b) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to

revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure, copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the regional director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

(d) Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the ap-

propriate district court for the enforcement of such subpena, but neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

* * * * *

SEC. 102.34 *Who shall conduct; to be public unless otherwise ordered.*—The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner, Washington, D. C., or the associate chief trial examiner, San Francisco, California, as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the trial examiner.

SEC. 102.35 *Duties and powers of trial examiners.*—It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

(a) To administer oaths and affirmations;

(b) To grant applications for subpenas;

(c) To rule upon petitions to revoke subpenas;

(d) To rule upon offers of proof and receive relevant evidence.

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing and, if appropriate or necessary, to exclude

persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;

(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);

(i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;

(j) To call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

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